



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 166818

Pursuant to petition filed June 23, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a telephone hearing was held on Tuesday, September 29, 2015 at 09:00 AM.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

Respondent's Representative:

Pat DeLessio
Legal Action of Wisconsin
230 W. Wells Street
Room 800
Milwaukee, WI 53203,

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County in at least January, 2015.

2. On January 28, 2015, the following post appeared on the respondent's Facebook page: "Anybody selling food stamps inbox me please." The Department verified that the page belonged to the respondent. Exhibit P-2.
3. On February 7, 2015, the following post appeared on the respondent's Facebook page: "Who ever on my page get the fuck off and stop in boxing my people. Dumb ass I can see every fuck think u do." Exhibit R-1.
4. On June 29, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to traffic FS. The violation would be the respondent's first Intentional Program Violation (IPV).

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Wis. Stat., §49.795(1)(dm) defines trafficking of FS as to “Buy, sell, steal, or otherwise accomplish the exchange of, directly, indirectly, in collusion with others, or individually, food stamp program benefits issued and accessed through the electronic benefit transfer program ... for cash or other consideration that is not food.” Federal rules include the intent to buy or sell FS online among the prohibited scope of trafficking violations. Exhibit 5.

The issue before me is whether there is clear and convincing evidence that the respondent authored or is responsible for the Facebook post on January 28, 2015. If so the action would fit within the definition of trafficking and would warrant an FS disqualification. The respondent testified that she did not post the messages; she was unable to discover who had posted the request. She did, however, post on February 7, 2015, indicating that she was aware of someone using her Facebook page without her permission. It does not appear that the respondent was aware of the IPV investigation until the date of the Administrative Disqualification Hearing Notice, more than four months later. The respondent testified that she was never spoke with petitioner during the pendency of the investigation. If find this information to corroborate petitioner’s claim that she did not personally post the Facebook message at issue, and that she did not allow someone to use her Facebook page to make the post.

The record before me is relatively scant and *is* contradicted, and I note that the petitioner has the burden of proof here. Relying solely upon one Facebook posting, with no other corroborating evidence of the respondent’s intent to purchase FS benefits harms the petitioner’s case. The respondent could have, but did not, pursued further investigation to strengthen its case. These tools could include follow-up inquiries under assumed names to those who post the information. This takes more effort, and thus is less efficient, than merely combing the internet and bringing an action against anyone who does something suspicious. But efficiency standing alone is rarely a virtue in law enforcement, especially if it interferes with justice.

Based upon the record before me, I find that the petitioner has failed to establish by clear and convincing evidence that the respondent intentionally violated FS program rules. The Office of Inspector General's burden of proof is important in this matter because it must do more than show that it is simply more likely than not that the respondent intentionally violated the FoodShare program's rules. The evidence presented does not rise to the level of clear and convincing evidence. Therefore, the petitioner's determination is reversed.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

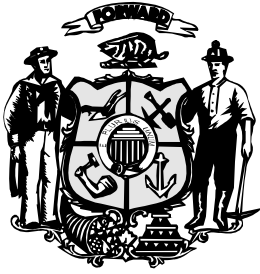
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of October, 2015

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Attorney Patricia Delessio - email
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The preceding decision was sent to the following parties on October 23, 2015.

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Division of Health Care Access and Accountability
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